

A Leftenan Kolonel Shaifullizan bin Abd Aziz (Commanding Officer for the Fifth Battalion of the Royal Ranger Regiment) & Ors v Muhammad Maliki bin Abdul Halim and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NOS D-01(NCVC)(W)-750-10 OF 2022 AND
D-01(NCVC)(W)-763-10 OF 2022

C AZIZAH NAWAWI, AZIMAH OMAR AND WONG KIAN
KHEONG JJCA

9 APRIL 2025

- D** *Armed Forces — Detention — Validity of — Serviceman charged under s 51 of Armed Forces Act 1972 — Serviceman detained by way of close arrest pending investigation — Serviceman detained by way of close arrest pending court-martial — Whether detention pending investigation valid pursuant to Armed Forces Act 1972 and Armed Forces (Court Martial) Rules of Procedure 1976 (‘the AFRP’)*
- E** *— Whether detention pending court-martial was lawful — Whether serviceman could be remanded without express remand order by commanding officer, court-martial or convening authority — Whether serviceman could be remanded pending court-martial’s trial before any witness had testified at court-martial’s trial — Whether learned judicial commissioner was right to apply r 14(2) of the AFRP*
- F** *and s 54(2) of the Interpretation Acts 1948 and 1967 regarding time period for court-martial’s trial to be completed — Whether serviceman’s personal liberty under art 5(1) of the Federal Constitution had been deprived — Armed Forces Act 1972 ss 51, 93(1), (3), 94(1), (2), 95, 96(3) & 97(9) — Armed Forces (Court Martial) Rules of Procedure 1976 rr 13(1), (2), 14(1), (2), 15(1), (2), (3) &*
- G** *16(1) — Federal Constitution art 5(1) — Interpretation Acts 1948 and 1967 ss 3(b), 54(1) & (2)*

- H** The plaintiff was a serviceman in the Fifth Battalion of the ‘Royal Ranger Regiment’, Desa Pahlawan Army Camp (‘the army camp’) whilst the first defendant was the plaintiff’s commanding officer at the army camp. During a surprise drug prevention operation in the army camp, 26 rangers including the plaintiff was asked to provide their urine samples. The urine samples were sent to the Chemistry Department of Malaysia (‘CDM’) for analysis and the analysis revealed that the plaintiff’s urine sample contained
- I** methamphetamine, a substance prohibited by a standing order made under s 51 of the Armed Forces Act 1972 (‘the AFA’). On 7 August 2014, the plaintiff was placed under close arrest pending the completion of the investigation for the charge under s 51 of the AFA (‘the said charge’). As the investigation could not be completed within eight days, the first defendant had prepared a special

report under s 94(2) of the AFA. After the completion of the investigation, on 26 August 2014, the plaintiff was brought before the first defendant and the plaintiff had elected to be tried by a court-martial under s 97(9) of the AFA. The first defendant then remanded the plaintiff by way of 'close arrest' pending the disposal of the court-martial's trial. On 3 July 2015, the plaintiff was released on 'open arrest'. In short, from 7 August 2014 until 26 August 2014, the plaintiff had been detained pending investigation by way of close arrest ('the detention pending investigation'), and from 26 August 2014 until 3 July 2015, the plaintiff had been detained pending the court-martial's trial by way of close arrest ('the detention pending court-martial'). The plaintiff then brought an action in the High Court seeking a declaration that the plaintiff's close arrest for 250 days was unlawful. The plaintiff had also prayed for general damages, exemplary damages, aggravated damages and special damages. The High Court decided that the detention pending investigation was valid whilst the detention pending court-martial was unlawful. The court further ordered the defendants to pay a global sum of damages amounting to RM300,000 and costs amounting to RM30,000 to the plaintiff. Aggrieved, both parties filed the present appeals. The first issue that arose was whether the learned judicial commissioner ('the JC') had correctly decided that the detention pending investigation was lawful and that the following provisions of written law had not been breached: (a) ss 93(1), (3), 94(1), (2) and 95 of the AFA; and/or (b) rr 13(1), (2), 14(1), (2) and 15(1) to (3) of the Armed Forces (Court Martial) Rules of Procedure 1976 ('AFRP'). With regard to the detention pending court-martial, the issue to be determined by the court were: (i) whether the plaintiff shall be remanded for trial by court-martial (in the form of close arrest) pursuant to s 96(3) of the AFA without a remand order by the first or second defendant; (ii) whether the plaintiff could be remanded pending the court-martial's trial before any witness had testified at the court-martial's trial; and (iii) whether the learned JC was right to apply r 14(2) of the AFRP and s 54(2) of the Interpretation Acts 1948 and 1967 ('the IA') regarding the time period for the court-martial's trial to be completed.

Held, allowing the defendants' appeal, dismissing the plaintiff's appeal and setting aside the High Court's judgment with one set of costs in the sum of RM40,000 to be paid by the plaintiff to the defendants for the two appeals and the High Court's proceedings:

- (1) By reason of the result of the CDM's analysis of the plaintiff's urine sample, the first defendant could lawfully arrest the plaintiff under s 93(1) of the AFA. Further, the plaintiff was arrested by the first defendant, an officer of a superior rank than the plaintiff, in accordance with s 93(1), (3) and the proviso to s 93(3) of the AFA. The court found that r 13(1) of the AFRP did not apply to the plaintiff because the said charge concerned an offence of a serious nature. In addition, the first defendant was justified to place the plaintiff under close arrest pursuant

- A to r 13(2) of the AFRP because it was ‘absolutely necessary’ to prevent any serviceman who had been reasonably suspected to have consumed illicit drugs from possessing or had access to fully automatic machine guns, grenades and fully automatic handguns at the army camp (see para 23).
- B (2) Upon the plaintiff’s arrest by the first defendant, the first defendant had investigated the said charge as mandatorily required under ss 94(1) and 95 of the AFA and r 14(2) of the AFRP. Although the plaintiff had been detained more than eight days, s 94(2) of the AFA, r 15(1) and (2) of the AFRP had been complied with when the first defendant prepared the
- C special report under s 94(2) of the AFA. There was also no delay in the investigation of the said charge, as such, the first defendant did not breach s 94(1) of the AFA and r 14(2) of the AFRP. Lastly, the plaintiff was not detained for the purpose of the investigation without being tried for more than 72 days, as such, r 15(3) of the AFRP had not been
- D contravened. Based on the above evidence and reasons, the court found that the learned JC had correctly decided that the detention pending investigation was lawful (see para 24).
- E (3) Regarding the validity of the detention pending court-martial, upon the fulfillment of the two conditions in s 96(3) of the AFA, ie, firstly, the completion of the investigation with regard to the said charge, and
- F secondly, the serviceman or officer had elected to be tried in a court-martial under s 97(9) of the AFA (‘the two conditions’), the following two consequences mandatorily ensued as a matter of operation of law: (a) the charge against the serviceman or officer could not be disposed of summarily; and (b) the serviceman or officer ‘shall be remanded for trial by court-martial’ (see para 28(1), (2) & (7)).
- G (4) Section 96(3) of the AFA and r 16(1) of the AFRP did not provide that an accused could only be lawfully remanded if the court-martial’s trial had commenced in the sense that at least one witness had been called to give evidence. In addition, there was nothing in the said provisions which required an express remand order by the commanding officer, court-martial or convening authority before an accused could be lawfully
- H remanded. In this regard, the learned JC erred in deciding that: (a) the plaintiff could only be lawfully remanded under s 96(3) of the AFA if the first and second defendants had made a remand order; and (b) the detention pending court-martial was not valid because no witness had testified at the court-martial’s trial. The High Court had erroneously
- I relied on r 14(2) of the AFRP which only applied to the detention pending investigation and not to the detention pending court-martial. On totality, the court found that the detention pending court-martial was valid pursuant to s 96(3) of the AFA and r 16(1) of the AFRP (see paras 28(6), (7) & 29).

- (5) Section 54(1) and (2) of the IA only applied to compute the time period for anything to be done under any written law. Section 96(3) of the AFA and r 16(1) of the AFRP did not provide for any time period to complete the court-martial's trial. Hence, the learned JC had committed an error of law by applying s 54(2) of the IA in the present case (see para 30).
- (6) As explained above, the detention pending court-martial was valid according to s 96(3) of the AFA and r 16(1) of the AFRP. These provisions constituted 'written law' within the meaning of s 3(b) of the IA and 'law' in art 5(1) of the Federal Constitution. Accordingly, the plaintiff's personal liberty had been lawfully deprived in accordance with 'law' as provided in art 5(1) of the Federal Constitution. The court therefore decided that the High Court's judgment could not stand and the global sum of damages ought to be set aside (see para 32).

[Bahasa Malaysia summary]

Plaintif adalah seorang askar dalam Batalion Kelima 'Rejimen Renjer Diraja', Kem Tentera Desa Pahlawan ('kem tentera tersebut') manakala defendan pertama ialah pegawai memerintah plaintiff di kem tentera tersebut. Semasa operasi mengejut pencegahan dadah di kem tentera tersebut, 26 renjer termasuk plaintiff diminta memberikan sampel urin mereka. Sampel urin tersebut dihantar ke Jabatan Kimia Malaysia ('JKM') untuk dianalisis dan analisis tersebut mendapati sampel urin plaintiff mengandungi methamphetamine, bahan yang dilarang oleh perintah tetap yang dibuat di bawah s 51 Akta Angkatan Tentera 1972 ('AAT'). Pada 7 Ogos 2014, plaintiff telah diletakkan di bawah tangkapan rapi sementara menunggu selesainya siasatan bagi pertuduhan di bawah s 51 AAT ('pertuduhan tersebut'). Oleh kerana siasatan tidak dapat diselesaikan dalam tempoh lapan hari, defendan pertama telah menyediakan laporan khas di bawah s 94(2) AAT. Selepas penyiasatan selesai, pada 26 Ogos 2014, plaintiff telah dibawa ke hadapan defendan pertama dan plaintiff telah memilih untuk dibicarakan oleh Mahkamah Tentera di bawah s 97(9) AAT. Defendan pertama kemudian menahan reman plaintiff dengan cara 'tangkapan rapi' sementara menunggu perbicaraan Mahkamah Tentera selesai. Pada 3 Julai 2015, plaintiff dibebaskan melalui 'tangkapan longgar'. Ringkasnya, dari 7 Ogos 2014 hingga 26 Ogos 2014, plaintiff telah ditahan melalui tangkapan rapi sementara menunggu siasatan ('penahanan sementara menunggu siasatan'), dan dari 26 Ogos 2014 sehingga 3 Julai 2015, plaintiff telah ditahan melalui tangkapan rapi sementara menunggu perbicaraan Mahkamah Tentera ('penahanan sementara menunggu perbicaraan Mahkamah Tentera'). Plaintiff kemudiannya membawa tindakan di Mahkamah Tinggi untuk mendapatkan pengisytiharan bahawa tangkapan rapi plaintiff selama 250 hari adalah menyalahi undang-undang. Plaintiff juga telah memohon ganti rugi am, ganti rugi teladan, ganti rugi teruk dan ganti rugi khas. Mahkamah Tinggi memutuskan bahawa penahanan sementara menunggu siasatan tersebut adalah sah manakala penahanan

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- A sementara menunggu perbicaraan Mahkamah Tentera adalah menyalahi undang-undang. Mahkamah Tinggi seterusnya memerintahkan defendan-defendan membayar jumlah global ganti rugi sebanyak RM300,000 dan kos berjumlah RM30,000 kepada plaintif. Terkilan dengan keputusan tersebut, kedua-dua pihak memfailkan rayuan-rayuan semasa. Isu pertama
- B yang timbul ialah sama ada pesuruhjaya kehakiman yang bijaksana ('PK') telah memutuskan dengan betul bahawa penahanan sementara menunggu siasatan tersebut adalah sah dan bahawa peruntukan-peruntukan undang-undang bertulis berikut tidak dilanggar: (a) ss 93(1), (3), 94(1), (2) dan 95 AAT; dan/atau (b) kk 13(1), (2), 14(1), (2) dan 15(1) hingga (3) Kaedah-Kaedah
- C Acara Angkatan Tentera (Mahkamah Tentera) 1976 ('KAAT'). Berkenaan dengan penahanan sementara menunggu perbicaraan Mahkamah Tentera, isu yang perlu ditentukan oleh mahkamah ialah: (i) sama ada plaintif perlu direman untuk dibicarakan oleh Mahkamah Tentera (dalam bentuk tangkapan rapi) menurut s 96(3) AAT tanpa perintah reman oleh defendan pertama atau
- D defendan kedua; (ii) sama ada plaintif boleh direman sementara menunggu perbicaraan Mahkamah Tentera sebelum mana-mana saksi memberi keterangan pada perbicaraan Mahkamah Tentera; dan (iii) sama ada PK yang bijaksana betul apabila menggunakan k 14(2) KAAT dan s 54(2) Akta Tafsiran 1948 dan 1967 ('AT') berkenaan tempoh masa untuk perbicaraan Mahkamah
- E Tentera diselesaikan.

Diputuskan, membenarkan rayuan defendan-defendan, menolak rayuan plaintif dan mengenenpikan penghakiman Mahkamah Tinggi dengan satu set kos berjumlah RM40,000 yang perlu dibayar oleh plaintif kepada

F defendan-defendan untuk rayuan-rayuan semasa dan prosiding di Mahkamah Tinggi:

- (1) Disebabkan oleh keputusan analisis JKM terhadap sampel urin plaintif, defendan pertama boleh menangkap plaintif secara sah di bawah s 93(1) AAT. Selanjutnya, plaintif telah ditangkap oleh defendan pertama, seorang pegawai berpangkat atasan daripada plaintif, mengikut s 93(1), (3) dan proviso kepada s 93(3) AAT. Mahkamah mendapati k 13(1) KAAT tidak terpakai kepada plaintif kerana pertuduhan tersebut melibatkan kesalahan yang berat. Di samping itu, tindakan defendan pertama untuk meletakkan plaintif di bawah tangkapan rapi menurut k 13(2) KAAT adalah wajar kerana ia adalah 'benar-benar perlu' untuk menghalang mana-mana askar yang telah disyaki secara munasabah telah mengambil dadah terlarang daripada memiliki atau mempunyai akses kepada mesingan automatik sepenuhnya, bom tangan dan pistol automatik sepenuhnya di kem tentera tersebut (lihat perenggan 23).
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- (2) Selepas penahanan plaintif oleh defendan pertama, defendan pertama telah menyiasat pertuduhan tersebut sebagaimana dikehendaki secara mandatori di bawah ss 94(1) dan 95 AAT dan k 14(2) KAAT. Walaupun plaintif telah ditahan lebih daripada lapan hari, s 94(2) AAT, k 15(1) dan

- (2) KAAT telah dipatuhi apabila defendan pertama menyediakan laporan khas di bawah s 94(2) AAT. Tiada juga kelewatan dalam siasatan pertuduhan tersebut, oleh itu, defendan pertama tidak melanggar s 94(1) AAT dan k 14(2) KAAT. Akhir sekali, plaintif tidak ditahan untuk tujuan siasatan tanpa dibicarakan selama lebih daripada 72 hari, oleh itu, k 15(3) KAAT tidak dilanggar. Berdasarkan keterangan dan alasan-alasan di atas, mahkamah mendapati PK yang bijaksana telah memutuskan dengan betul bahawa penahanan sementara menunggu siasatan tersebut adalah sah (lihat perenggan 24). A B
- (3) Berkenaan dengan keabsahan penahanan sementara menunggu perbicaraan Mahkamah Tentera tersebut, setelah memenuhi dua syarat dalam s 96(3) AAT, iaitu, pertama, selesainya penyiasatan berkenaan dengan pertuduhan tersebut, dan kedua, askar atau pegawai telah memilih untuk dibicarakan di Mahkamah Tentera di bawah s 97(9) AAT ('dua syarat tersebut'), dua akibat berikut berlaku melalui operasi undang-undang: (a) pertuduhan terhadap askar-lasykar atau pegawai tersebut tidak boleh diselesaikan secara terus; dan (b) askar atau pegawai tersebut 'hendaklah direman untuk dibicarakan oleh mahkamah tentera' (lihat perenggan 28(1), (2) & (7)). C D E
- (4) Seksyen 96(3) AAT dan k 16(1) KAAT tidak memperuntukkan bahawa tertuduh hanya boleh direman secara sah jika perbicaraan Mahkamah Tentera telah dimulakan dalam erti kata bahawa sekurang-kurangnya seorang saksi telah dipanggil untuk memberi keterangan. Di samping itu, tiada apa-apa pun dalam peruntukan-peruntukan tersebut yang memerlukan perintah reman nyata oleh pegawai memerintah, Mahkamah Tentera atau pihak berkuasa yang memanggil sidang sebelum tertuduh boleh direman secara sah. Dalam hal ini, PK yang bijaksana terkhilaf dalam memutuskan bahawa: (a) plaintif hanya boleh direman secara sah di bawah s 96(3) AAT jika defendan pertama dan kedua telah membuat perintah reman; dan (b) penahanan sementara menunggu perbicaraan Mahkamah Tentera adalah tidak sah kerana tiada saksi telah memberi keterangan pada perbicaraan Mahkamah Tentera. Mahkamah Tinggi telah terkhilaf bergantung pada k 14(2) KAAT yang hanya terpakai kepada penahanan sementara menunggu siasatan dan bukan kepada penahanan sementara menunggu perbicaraan Mahkamah Tentera. Secara keseluruhannya, mahkamah mendapati bahawa penahanan sementara menunggu perbicaraan Mahkamah Tentera adalah sah menurut s 96(3) AAT dan k 16(1) KAAT (lihat perenggan 28(6), (7) & 29). F G H I
- (5) Seksyen 54(1) dan (2) AT hanya terpakai untuk mengira tempoh masa untuk apa-apa perkara yang perlu dilakukan di bawah mana-mana undang-undang bertulis. Seksyen 96(3) AAT dan k 16(1) KAAT tidak memperuntukkan apa-apa tempoh masa untuk menyelesaikan

A perbicaraan Mahkamah Tentera. Oleh itu, PK yang bijaksana telah melakukan kesilapan undang-undang dengan menggunakan s 54(2) AT dalam kes semasa (lihat perenggan 30).

B (6) Seperti yang dijelaskan di atas, penahanan sementara menunggu perbicaraan Mahkamah Tentera tersebut adalah sah menurut s 96(3) AAT dan k 16(1) KAAT. Peruntukan-peruntukan ini membentuk 'undang-undang bertulis' dalam pengertian s 3(b) AT dan 'undang-undang' dalam perkara 5(1) Perlembagaan Persekutuan. C Sehubungan itu, kebebasan diri plaintif telah dilucutkan secara sah mengikut 'undang-undang' seperti yang diperuntukkan dalam perkara 5(1) Perlembagaan Persekutuan. Oleh itu, mahkamah memutuskan bahawa penghakiman Mahkamah Tinggi tidak boleh kekal dan jumlah ganti rugi global tersebut harus diketepikan (lihat perenggan 32).

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Cases referred to

Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut [1996] 4 MLJ 184, HC (overd)

E *Leftenan Kolonel Hafiz bin Hj Sulaiman & Ors v Zulkefli bin Mohamed* [2023] 5 MLJ 548, CA (refd)

Savrimuthu Sinnapan v PP [1987] 2 MLJ 173, SC (refd)

Sjn (U) Ahmad Zaini bin Zainon lwn Kolonel TUDM Norazrin bin Shamsudin dan lain-lain [2021] MLJU 1913; [2021] 1 LNS 1314, HC (overd)

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Legislation referred to

Armed Forces (Court Martial) Rules of Procedure 1976 rr 13, 13(1), (2), 14, 14(1), (2), 15, 15(1), (2), (3), 16, 16(1), (2), 38(1), (2)

Armed Forces (Summary Jurisdiction) Regulations 1976 reg 12

G Armed Forces Act 1972 ss 2, 51, 93, 93(1), (3), 94, 94(1), (2), 95, 96, 96(1), (2), (3), (5), 97, 97(3), (9), 103, 104, 105(1), 119

Criminal Procedure Code ss 117, 117(2), (7)

Federal Constitution arts 5(1), 160(2)

Interpretation Acts 1948 and 1967 ss 2(1)(b), 3(b), 23(1), 54, 54(1), (2), Part I

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Revision of Laws Act 1968

I **Appeal from:** *Muhammad Maliki bin Abdul Halim lwn Leftenan Kolonel-Shaifullizan bin Abd Aziz (Pegawai Memerintah Batalion Ke-5 Regimen Renjer Diraja) dan lain-lain* [2022] MLJU 2903 (High Court, Kota Bharu)

Nur Ezdiani bt Roleb (with Norfauzani bt Mohd Nordin and Safiyyah bt Omar) (Attorney General's Chambers) for the appellant.

Shaharuddin bin Mohamed (with Nur Shafika bt Mustaffa) (Shaharuddin Hidayu & Marwaliz) for the respondent.

Wong Kian Kheong JCA (delivering judgment of the court):

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A. INTRODUCTION

[1] The above two appeals ('two appeals') are heard together as these two appeals emanated from one trial in the High Court.

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[2] These two appeals discusses the following main question, namely, where:

- (1) a 'serviceman' (defined in s 2 of the Armed Forces Act 1972 ('the AFA')) of the Armed Forces ('accused') was brought before the 'commanding officer' (as understood in s 2 of the AFA) ('Commanding Officer') of the accused on the ground that the accused had committed an offence under the AFA ('alleged offence');
- (2) the Commanding Officer decided to arrest and detain the accused by way of 'close arrest' (*tahanan ketat atau tahanan rapi*) pending the completion of the Commanding Officer's investigation regarding the alleged offence ('investigation'); and
- (3) after the completion of the investigation, the accused was charged by the Commanding Officer with regard to the alleged offence ('charge'):
 - (a) the Commanding Officer 'determined' that the accused was guilty of the charge but before recording the finding that the accused was guilty of the charge, the Commanding Officer gave the accused an opportunity to elect to be tried by a 'court-martial' (within the meaning in s 2 read with s 103 of the AFA);
 - (b) the accused elected to be tried by a court-martial under s 97(9) of the AFA; and
 - (c) the Commanding Officer remanded the accused by way of close arrest pending the disposal of the accused's trial in the court-martial.

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B. BACKGROUND

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[3] We shall refer to the parties as they were in the High Court.

[4] At the material time:

- (1) the plaintiff ('plaintiff') was a serviceman in the Fifth Battalion of the 'Royal Ranger Regiment' (*Rejimen Renjer DiRaja*), Desa Pahlawan Army Camp, Kota Bahru, Kelantan Darul Nairn ('army camp'); and
- (2) the first defendant ('first defendant') was the plaintiffs Commanding Officer at the army camp.

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- A** [5] On 29 March 2014, at about 12.30am, a surprise drug prevention operation was conducted in the army camp where 26 Rangers, including the plaintiff, were asked to provide their urine samples ('urine samples').
- B** [6] The urine samples were sent to the Chemistry Department of Malaysia ('CDM') for analysis.
- C** [7] CDM's analysis of the 26 urine samples revealed that nine of the urine samples, including the plaintiff's urine sample, contained 'methamphetamine', a substance prohibited by a 'standing order' ('SO') made under s 51 of the AFA. Consequently, on 7 August 2014:
- D** (1) the plaintiff was brought before the first defendant (as the plaintiff's Commanding Officer) for the purpose of the first defendant's investigation of the charge that the plaintiff had contravened the SO; and
- (2) the first defendant decided to place the plaintiff under close arrest pending the completion of the investigation ('arrest (investigation)').
- E** [8] The plaintiff was detained for more than eight days as the investigation could not be completed. Hence, the first defendant made a 'special report' under s 94(2) of the AFA (*laporan kelengahan lapan hari*) (first defendant's report (s 94(2) of the AFA)).
- F** [9] After the completion of the investigation, on 26 August 2014:
- G** (1) the plaintiff was brought before the first defendant for the purpose of the charge under s 51 of the AFA ('charge (s 51 of the AFA)');
- (2) the first defendant informed the plaintiff that as the plaintiff's Commanding Officer, the first defendant determined that the plaintiff was guilty of the charge (s 51 of the AFA) but before recording the finding that the plaintiff was guilty of the charge (s 51 of the AFA), the first defendant gave the plaintiff an opportunity to elect to be tried by a court-martial;
- H** (3) the plaintiff elected to be tried by a court-martial under s 97(9) of the AFA ('trial (court-martial)'); and
- I** (4) the first defendant remanded the plaintiff by way of close arrest pending the disposal of the trial (court-martial).
- [10] In this judgment, we shall refer to the plaintiff's detention from 7 August 2014 (date of the arrest (investigation)) until 26 August 2014 (date of the charge (s 51 of the AFA)) as the 'detention (pending investigation)'.

- [11] On 8 April 2015, on the first day of the trial (court-martial): A
- (1) the charge (s 51 of the AFA) was read to the plaintiff;
 - (2) the plaintiff pleaded not guilty to the charge (s 51 of the AFA) and claimed trial in the court-martial;
 - (3) the trial (court-martial) was adjourned to 18 May 2015 to 20 May 2015 because there was a delay in the service of the charge (s 51 of the AFA) on the plaintiffs learned defence counsel; B
 - (4) the plaintiffs learned defence counsel informed the court-martial that the plaintiff had been detained for 244 days (from 7 August 2014 to 8 April 2015). Hence, the plaintiffs learned defence counsel applied to the court-martial for bail to be granted to the plaintiff pending the trial (court-martial); and C
 - (5) the President (as understood in s 105(1) of the AFA) of the court-martial stated that the court-martial has no jurisdiction to grant bail to the plaintiff pending the trial (court-martial). The President further stated that he had advised the second defendant ('second defendant'), the authority which convened the court-martial pursuant to s 104 of the AFA ('convening authority'), to release the plaintiff on bail pending the trial (court-martial). D
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- [12] The trial (court-martial) could not proceed on 18 May 2015 to 20 May 2015 because the President and the prosecuting officer had to attend a meeting with the judge advocate general in Kota Kinabalu, Sabah on those dates. F
- [13] On 2 June 2015, the plaintiff applied to the High Court for a writ of habeas corpus for an order to release him from the detention (pending court-martial) ('habeas corpus application'). G
- [14] The hearing of the habeas corpus application was fixed on 13 July 2015. Before the hearing of the habeas corpus application, the plaintiff was released on 'open arrest' (*tahanan longgar*) on 3 July 2015 ('date (open arrest)') pending the trial (court-martial). As such, the habeas corpus application was withdrawn. H
- [15] In this judgment, we shall refer to the plaintiff's detention from 26 August 2014 (date of the charge (s 51 of the AFA)) until 3 July 2015 (date (open arrest)) as the 'detention (pending court-martial)'. I

A C. PROCEEDINGS IN THE HIGH COURT

[16] The plaintiff filed this suit in the High Court ('this suit') against all the defendants ('defendants'). The statement of claim filed in support of this suit pleaded as follows, among others:

- B**
- (1) the plaintiff's close arrest for 250 days was unlawful due to the following reasons:
- C**
- (a) there was a breach of s 94(1) of the AFA and r 14 of the Armed Forces (Court Martial) Rules of Procedure 1976 ('the AFRP') when there was an undue delay by the first defendant in the investigation regarding the alleged offence;
- D**
- (b) s 94(2) of the AFA was contravened when the plaintiff had been detained for more than eight days without a court-martial and the first defendant did not prepare a 'special report' for the necessity for further delay in the first defendant's investigation into the alleged offence;
- E**
- (c) r 15(3) of the AFRP was not complied with because the plaintiff was under close arrest for more than 72 days without trial (court-martial) and there was no written direction by the second defendant (convening authority) with the prior approval of the 'Competent Authority' (defined in s 2 of the AFA) that the plaintiff shall not be released from close arrest;
- F**
- (d) r 16(1) of the AFRP was breached when the plaintiff was under close arrest for 86 days from 8 April 2015 until 3 July 2015 (date (open arrest)) because the trial (court-martial) had not commenced in the sense that no witness had been called to testify;
- G**
- (e) ss 95 and 96 of the AFA had not been followed by the defendants in this case; and
- (f) the plaintiffs personal liberty under art 5(1) of the Federal Constitution ('the FC') had been contravened; and
- H**
- (2) as a result of the unlawful close arrest of the plaintiff, the following remedies, among others, were prayed for:
- I**
- (a) a declaration that the plaintiffs close arrest for 250 days was unlawful; and
- (b) an assessment by the court of the following damages to be paid by the defendants to the plaintiff:
- (i) general damages;
- (ii) exemplary damages;

- (iii) aggravated damages; and
- (iv) special damages.

A

[17] The defendants resisted this suit and claimed that the plaintiffs close arrest in this case was lawful.

B

[18] After a trial, the learned judicial commissioner ('JC'), as he then was, allowed this suit and adjudged as follows:

- (1) the High Court granted a declaration that the plaintiffs close arrest for 311 days from 26 August 2014 (date of the charge (s 51 of the AFA)) until 3 July 2015 (date (open arrest)) was unlawful;
- (2) the defendants shall pay a global sum of damages in a sum of RM300,000 to the plaintiff ('global sum (damages)'); and
- (3) costs in an amount of RM30,000 shall be paid by the defendants to the plaintiff, ('High Court's judgment').

C

D

[19] According to the High Court's 'Grounds of Judgment', among others:

E

- (1) the validity of following two stages of the plaintiffs detention would be decided by the learned JC:
 - (a) the detention (pending investigation) (from 7 August 2014 (date of the arrest (investigation)) until 26 August 2014 (date of the charge (s 51 of the AFA))); and
 - (b) the detention (pending court-martial) (from 26 August 2014 (date of the charge (s 51 of the AFA)) until 3 July 2015 (date (open arrest))).
- (2) the detention (pending investigation) was valid because:
 - (a) as required by s 94(2) of the AFA, the first defendant's report (s 94(2) of the AFA) had been prepared; and
 - (b) the detention (pending investigation) did not exceed 72 days. Accordingly, rr 14 and 15 of the AFRP had been complied with.
- (3) the detention (pending court-martial) was unlawful due to the following reasons:
 - (a) AFA did not prescribe a time period for the detention (pending court-martial). However, r 14(2) of the AFRP has provided for 'proceedings shall be taken for punishing' the offence or 'he shall be released from arrest';
 - (b) s 54(2) of the Interpretation Acts 1948 and 1967 ('the IA') applied

F

G

H

I

- A** to this case and the trial (court-martial) ‘shall be done with all convenient speed’;
- (c) the detention (pending court-martial) could only be lawfully imposed under s 96(3) of the AFA when the trial (court-martial) commenced in the sense that witnesses had been called to testify.
- B** Reliance had been placed by the learned JC on the following cases:
- (i) the judgment of the Supreme Court delivered by Salleh Abas LP in *Savrimuthu Sinnapan v Public Prosecutor* [1987] 2 MLJ 173;
- C** (ii) the decision of Zulkefli Makinuddin JC (as he then was) in the High Court case of *Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut* [1996] 4 MLJ 184; and
- D** (iii) the judgment of Azmi Abdullah J in the High Court in *Sjn (U) Ahmad Zaini bin Zainon lwn Kolonel TUDM Norazrin bin Shamsudin dan lain-lain* [2021] MLJU 1913; [2021] 1 LNS 1314.
- E** According to r 16(1) of the AFRP, the plaintiff could only be remanded under close arrest pending the trial (court-martial) after witnesses had given evidence.
- (d) for a valid remand under s 96(3) of the AFA, there must an order from the first or second defendant to remand the plaintiff pending the trial (court-martial). In this case, neither the first nor second defendant had issued an order pursuant to s 96(3) of the AFA to remand the plaintiff pending the trial (court-martial); and
- F**
- (4) the global sum (damages) was awarded in this case because:
- G** (a) the plaintiffs personal liberty had been unlawfully restrained by the detention (pending court-martial);
- (b) the plaintiff had been deprived of his time:
- (i) to be with his family; and
- H** (ii) to live an ordinary life,
– throughout the detention (pending court-martial);
- (c) the plaintiff had failed to prove trauma and loss due to the unlawful detention (pending court-martial); and
- I** (d) throughout the detention (pending court-martial), the plaintiff had been paid all his salaries and allowances.

D. THESE TWO APPEALS

A

[20] The defendants had filed an appeal to the Court of Appeal against the High Court's judgment in Civil Appeal No D-01(NCvC)(W)-750–10 of 2022 ('defendants' appeal'). Civil Appeal No D-01(NCvC)(W)-763–10 of 2022 had been lodged by the plaintiff in the Court of Appeal against the High Court's judgment ('plaintiff's appeal').

B

E. ISSUES

[21] The following questions arise in these two appeals:

C

- (1) whether the learned JC had correctly decided that the detention (pending investigation) was lawful and the following provisions of written law had not been breached in this case:

D

- (a) ss 93(1), (3), 94(1), (2) and 95 of the AFA; and/or
(b) rr 13(1), (2), 14(1), (2) and 15(1) to (3) of the AFRP.

- (2) with regard to the detention (pending court-martial):

E

- (a) if the charge (s 51 of the AFA) could not be summarily disposed of by the first defendant due to the fact that the plaintiff had elected to be tried by a court-martial under s 97(9) of the AFA:

F

- (i) whether the plaintiff 'shall be remanded for trial by court-martial (in the form of close arrest) pursuant to s 96(3) of the AFA without a remand order by the first or second defendant; and

G

- (ii) could the plaintiff be remanded pending the trial (court-martial) on 26 August 2014 (date of the charge (s 51 of the AFA)) before any witness had testified at the trial (court-martial)?

H

- (b) whether the learned JC was right to apply:

- (i) r 14(2) of the AFRP; and
(ii) s 54(2) of the IA,
– regarding the time period for the trial (court-martial) to be completed.

F. RELEVANT PROVISIONS OF WRITTEN LAW

[22] Sections 93 to 97 of the AFA as well as rr 13 to 16 and 38 of the AFRP are reproduced below:

I

AFA

s 93 *Arrest*

- A** (1) *Every person subject to service law under [AFA] found committing an offence against any provision of [AFA], or alleged to have committed or reasonably suspected of having, committed any such offence? may be arrested in accordance with the following provisions.*
- B** (2) An officer may be arrested by an officer of the regular forces of superior rank, or if engaged in a mutiny, quarrel or disorder, by such an officer of any rank.
- (3) *A serviceman or a volunteer (when subject to service law under this Act) may be arrested by any officer, warrant officer or non-commissioned officer of the regular forces:*
- C** *Provided that a person shall not be arrested by virtue of this subsection except by a person of superior rank.*
- (4) A rating exercising authority as a member of the regulating staff or as a member of the staff of the officer of the watch may arrest any rating.
- D** (5) A provost officer or any officer, warrant officer or noncommissioned officer or rating legally exercising authority under a provost officer, may arrest any officer, serviceman or volunteer (when subject to service law under this Act):
- E** *Provided that an officer shall not be arrested by virtue of this subsection except on the order of another officer.*
- (6) The power of arrest given to any person by this section may (subject to the provisions of any regulations made under this Act) be exercised either personally or by ordering into arrest the person to be arrested or by giving orders for that person's arrest.
- F** (7) In this section the expressions 'officer of the regular forces' and 'warrant officer or non-commissioned officer of the regular forces' include an officer, warrant officer or non-commissioned officer of any of the volunteer forces when they are subject to service law under this Act and of any foreign force duly appointed, seconded or attached to any of the regular forces or when such members of a foreign force are serving together or acting in combination with any of the regular forces under subsections 17(3) and (4) of the Visiting Forces Act 1980.
- G**
- H** s 94 *Provisions for avoiding delay after arrest*
- (1) *The allegations against any person subject to service law under this Act who is under arrest shall be duly investigated without unnecessary delay, and as soon as may be either proceedings shall be taken for punishing his offence or he shall be released from arrest.*
- I** (2) *Wherever any person subject to service law under this Act having been taken into service custody, remains under arrest for a longer period than eight days without a court-martial for his trial being assembled, a special report for the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner, and a similar report to the like authority and in the like manner every eight days until a court-martial is*

assembled or the offence is dealt with summarily or he is released from arrest: Provided that in the case of a person on active service, compliance with this subsection shall be excused in so far as it is not reasonably practicable, having regard to the exigency of operations.

A

- (3) For the purposes of subsection 84(1) the question whether there has been unnecessary delay in the taking of any steps for the investigation of allegations against a person under arrest shall be determined without regard to the provisions of the last foregoing subsection.

B

s 95 Investigation of charges by commanding officers

Before an allegation against a person subject to service law under this Act (hereinafter referred to as 'the accused') that he has committed an offence against any provision of this Part is further proceeded with, the allegation shall be reported, in the form of a charge, to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.

C

s 96 Charges to be dealt with summarily or by court martial

D

- (1) *After investigation, a charge against a commissioned officer below the rank of lieutenant-colonel or its equivalent or against a warrant officer may, if an authority has power under the following provisions of this Part to deal with it summarily, be so dealt with by that authority in accordance with those provisions.*
- (2) *After investigation, a charge against an appointed officer or against a serviceman or volunteer (when subject to sen/ice law under this Act) below the rank of warrant officer may be dealt with summarily by his commanding officer, subject to and in accordance with the following provisions of this Part.*
- (3) *If, after investigation, any charge is not dealt with summarily as aforesaid, the accused shall be remanded for trial by court-martial.*
- (4) *Notwithstanding anything in the foregoing provisions of this section, where —*
- (a) *the commanding officer has investigated a charge against a commissioned officer or a warrant officer; or*
- (b) *the commanding officer has investigated a charge against an appointed officer or against a serviceman or volunteer (when subject to service law under this Act) below the rank of warrant officer, which is not one which can be dealt with summarily, the commanding officer may dismiss the charge if he is of the opinion that it ought not to be further proceeded with.*
- (5) *References in this Act to dealing summarily with the charge are references to the taking by the appropriate superior authority or the commanding officer of the accused, as the case may require, of the following action, that is to say, determining whether the accused is guilty, dismissing the charge or recording a finding of guilty accordingly and awarding punishment.*

E

F

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H

I

s 97 Further proceedings on charges against an appointed officer, servicemen and volunteers below the rank of warrant officer

- A** (1) *The following provisions of this section shall have effect where the commanding officer has investigated a charge against an appointed officer or against a serviceman or volunteer (when subject to service law under this Act) below the rank of warrant officer.*
- B** (2) *If —*
- C** (a) *the charge is not one which can be dealt with summarily and the commanding officer has not dismissed it; or*
- (b) *the charge is one which can be dealt with summarily but the commanding officer is of the opinion that it should not be so dealt with, he shall take the prescribed steps with a view to the charge being tried by court-martial.*
- D** (3) *In any other case, the commanding officer shall proceed to deal with the charge summarily; and if he records a finding of guilty he may, subject to subsection (4), award one or more of the following punishments, that is to say:*
- E** (a) detention for a period not exceeding ninety days, or if the accused being a non-commissioned officer or private or its equivalent is on active service, field punishment not exceeding ninety days:
- F** Provided that —
- (i) a punishment of detention or field punishment awarded by a commanding officer to a noncommissioned officer shall not be carried into effect until it has been approved by an approving authority and only to the extent so approved;
- (ii) where a commanding officer awards more than twenty-eight days' detention or field punishment, the portion in excess of twenty-eight days shall be effective only if approved by and to the extent approved by an approving authority;
- G** (b) reduction to the ranks or any less reduction in rank or disrating to a rank not lower than a private or its equivalent in the Army, able rate in the Navy or aircraftman I in the Air Force, as the case may be, but, except as provided in subsections (5) and (6), a punishment of reduction to the ranks or any less reduction in rank or disrating to a rank not lower than a private or its equivalent in the Army, able rate in the Navy or aircraftman I in the Air Force, as the case may be, imposed by a commanding officer shall be effective only if approved by, and to the extent approved by, an approving authority;
- H** (c) a fine;
- (d) if the accused is an appointed officer or noncommissioned officer, severe reprimand or reprimand;
- I** (e) forfeiture of good conduct badges, but where such forfeiture will entail the forfeiture of a long service and good conduct medal, a punishment of forfeiture of good conduct badges shall be effective only if approved by an approving authority;

- (f) where the offence has occasioned any expense, loss or damage, stoppages; A
- (g) any minor punishments for the time being authorized in regulations made under this Part:
 Provided that no fine or minor punishment shall be awarded for an offence for which detention is awarded, and that no fine shall be awarded for an offence for which field punishment is awarded. B
- (4) If the accused is an appointed officer the commanding officer shall not award any punishment other than those set out in paragraphs (c), (d), (f) and (g) of the last foregoing subsection. C
- (5) Where the accused is a lance corporal or lance bombardier, and the commanding officer finds him guilty, the commanding officer may, if he awards no other punishment or no other punishment except stoppages, order the accused to be reduced to the ranks.
- (6) Where the accused is an acting warrant officer or acting non-commissioned officer, and the commanding officer finds him guilty, the commanding officer may, if he awards no other punishment or no other punishment except stoppages, order the accused to revert to his permanent rank or rate. D
- (7) Where a non-commissioned officer is awarded any period of detention or field punishment, he shall also be ordered to be reduced to the ranks or to be disrated to a grade lower than that of leading rating, as the case maybe: Provided that, if the commanding officer fails to order him to be so reduced, the sentence of the commanding officer shall not be invalid but shall be deemed to include a sentence of reduction to the ranks or of disrating to a grade lower than that of leading rating as the case may be. E F
- (8) Where a commanding officer awards a fine as a punishment for drunkenness, the amount of the fine shall not exceed thirty ringgit.
- (9) *Notwithstanding anything contained in subsection (3), where the commanding officer has determined that the accused is guilty and if the charge is dealt with summarily will award punishment other than severe reprimand, reprimand, fine or a minor punishment, or where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine), the commanding officer shall not record a finding until after affording the accused an opportunity of electing to be tried by court-martial; and if the accused so elects and does not subsequently, in accordance with regulations made under this Part withdraw his election, the commanding officer shall not record a finding of guilty but shall take the prescribed steps with a view to the charge being tried by court-martial.* G H
- (10) In this section 'approving authority' means any officer not below the rank of colonel or its equivalent designated by the Armed Forces Council as an approving authority for the purposes of this section. I
- (11) *Where a charge is one that can be dealt with summarily, but the commanding officer has taken steps with a view to its being tried by court-martial, any*

- A** *higher authority to whom the charge is referred may refer the charge back to the commanding officer to be dealt with summarily; and on any such reference the commanding officer shall dispose of the charge as if he had originally been of the opinion that the charge should be dealt with summarily.*
- B** *Provided that a charge shall not be referred back where the accused has elected to be tried by court-martial and has not withdrawn his election.*

AFRP

r 13 *Reasons for arrest*

- C** (1) *A person may not be placed or detained under arrest where the offence he has committed or is reasonably suspected of having committed is not of a serious nature.*
- (2) *A person shall be placed under arrest only when absolutely necessary for example when —*
- D** (a) *the offence is punishable with death;*
- (b) *he is deliberately trying to undermine discipline by acts of misconduct;*
- E** (c) *he is likely to injure himself or others;*
- (d) *he is likely to suborn witnesses;*
- (e) *he has been apprehended (and has not surrendered himself) as being absent without leave or is habitually absent without leave;*
- F** (f) *having regard to the nature or prevalence of the offence with which he is charged or which is under investigation, it is undesirable in the interests of discipline that he should be at large or in a position to consort with his comrades; or*
- (g) *it is suspected that he will not attend the investigation of the case or the trial.*

G

r 14 *Reconsideration of arrest and investigation*

- (1) *Subject to Rule 13 the person responsible (normally the commanding officer or the provost officer) for deciding whether a person should be kept under arrest and what the form of arrest should be, shall use his discretion from time to time, as circumstances may require, to change the form of arrest, to rearrest or to release him without prejudice to re-arrest.*
- H** (2) *The allegations against a person who is under arrest shall be duly investigated into without unnecessary delay and as soon as possible proceedings shall be instituted against him or he shall be duly released.*
- I**

r 15 *Delay reports*

- (1) *The report required by subsection (2) of section 94 of the Act with regard to the necessity for further delay in bringing an accused to trial shall be in the form set out in the First Schedule to these Rules.*

- (2) The report shall be in quadruplicate and sent direct to — **A**
- (a) in the case of the first copy — the convening officer;
 - (b) in the case of the second copy — the Principal Legal Officer of the Ministry of Defence;
 - (c) in the case of third copy — the Provost Marshal of the Ministry of Defence; and **B**
 - (d) in the case of the fourth copy — be retained by unit
- (3) *A person shall not be held under arrest for more than seventy-two days without being tried unless the convening authority, with the prior approval of the competent authority directs in writing that he shall not be released from arrest.* **C**

r 16 *Arrest during and after trial*

- (1) *During his trial by a court-martial the accused shall be held under close arrest, except where the convening authority directs that for the period of any adjournment of the court he shall be held under open arrest or released from arrest.* **D**
- (2) Where the sentence announced in court is lower in the scale of punishments than detention, the accused shall be released from arrest immediately after the trial. **E**

r 38 *Reference of charges to higher authority*

- (1) *When a commanding officer submits to higher authority a charge against an officer or warrant officer or a civilian to whom Part V of the Act is applied by section 211 or section 212 of the Act or has remanded a non-commissioned officer or soldier for trial by court-martial, he shall send to higher authority —* **F**
- (a) a copy of the charge on which the accused is held;
 - (b) a draft charge sheet containing the charges upon which the commanding officer considers that the accused should be dealt with summarily or tried by court-martial; **G**
 - (c) the summary or abstract of evidence;
 - (d) a statement of the character and service record of the accused; and **H**
 - (e) a recommendation as to how the charge should be proceeded with.
- (2) After a commanding officer has referred a charge to higher authority in accordance with paragraph (1) he shall not dismiss it unless it has been referred back to him with a direction to dismiss it. (Emphasis added.) **I**

A G. WAS THE DETENTION (PENDING INVESTIGATION) LAWFUL?

[23] Firstly, with regard to the charge (s 51 of the AFA), the first defendant was empowered to arrest the plaintiff pursuant to the following provisions in the AFA and AFRP:

- B**
- (1) CDM is an independent expert body without any interest in the outcome of this case. By reason of the result of CDM's analysis of the plaintiff's urine sample, the first defendant could lawfully arrest the plaintiff under s 93(1) of the AFA because the plaintiff was 'alleged to have committed or reasonably suspected of having committed' an offence under s 51 of the AFA;
- C**
- (2) the plaintiff had been arrested by the first defendant in accordance with s 93(1), (3) and the proviso to s 93(3) of the AFA (the plaintiff was arrested by the first defendant, an officer of a superior rank than the plaintiff); and
- D**
- (3) the charge (s 51 of the AFA) concerned an offence of a serious nature. Hence, r 13(1) of the AFRP did not apply to the plaintiff. The first defendant was justified to place the plaintiff under close arrest pursuant to r 13(2) of the AFRP because it was 'absolutely-necessary' to prevent any serviceman who had been reasonably suspected to have consumed illicit drugs (due to CDM's report) from possessing or had access to fully automatic machine guns, grenades and fully automatic handguns at the army camp.
- E**
- F**

[24] Secondly, we find that the learned JC had correctly decided that the detention (pending investigation) was lawful. The following evidence and reasons support this decision:

- G**
- (1) upon the plaintiffs arrest by the first defendant, ss 94(1), 95 of the AFA and r 14(2) of the AFRP mandatorily required the first defendant to investigate the charge (s 51 of the AFA) — please refer to the Court of Appeal's judgment in *Leftenan Kolonel Hafiz bin Hj Sulaiman & Ors v Zulkefli bin Mohamed* [2023] 5 MLJ 548, at [18(1)]. It was not disputed in this case that the first defendant had carried out the investigation;
- H**
- (2) notwithstanding the fact that for the purpose of the investigation, the plaintiff had been detained more than eight days, s 94(2) of the AFA, r 15(1) and (2) of the AFRP had been complied with when the first defendant's report (s 94(2) of the AFA) (regarding the delay in the completion of the first defendant's investigation) had been prepared;
- I**
- (3) there was no evidence that there had been undue delay in the first defendant's investigation of the charge (s 51 of the AFA). Accordingly,

the first defendant did not breach s 94(1) of the AFA and r 14(2) of the AFRP; and

A

- (4) the plaintiff was not detained for the purpose of the investigation without being tried for more than 72 days. As such, r 15(3) of the AFRP had not been contravened in this case.

B

H. WHAT IS THE EFFECT OF S 96(3) OF THE AFA AND R 16(1) OF THE AFRP?

[25] According to reg 12 of the Armed Forces (Summary Jurisdiction) Regulations 1976 ('the AFSJR'):

C

Charges with which a commanding officer or appropriate superior authority may deal summarily.

A commanding officer or an appropriate superior authority may deal summarily with a charge under any of the following sections of [AFA]: 44, 46 (e), 49, 50(2), 51, 52, 55, 56, 57, 58, 59(1)(a), 60, 61(c) and (d), 62(c), 63, 64, 65(2), 66, 67, 72, 77(a) and 81(b), 86 (where the principal offence can be dealt with summarily by virtue of this Regulation); 87 and 88 (where the civil offence is one which is specified in the Second Schedule to these Regulations). (Emphasis added.)

D

E

[26] Firstly, if a Commanding Officer has the power to dispose of a charge (s 51 of the AFA) against an accused summarily (without a trial in the court-martial) under ss 96(1), (2), (5) and 97(3) of the AFA read with reg 12 of the AFSJR, the accused has a right under s 97(9) of the AFA to elect to be tried in the court-martial (accused's election). The accused's election has been explained in the judgment of the Court of Appeal in *Leftenan Kolonel Hafiz*, at [18], as follows:

F

[18] *We are of the following view regarding a Commanding Officer's duties and discretionary powers with regard to a complaint that an accused has breached a SO pursuant to s 51 AFA:*

G

- (1) *s 95 of the AFA mandatorily requires the accused's Commanding Officer to investigate the charge against the accused (investigation);*

- (2) *after the investigation —*

H

- (a) *the Commanding Officer may dismiss the charge under s 96(4) of the AFA read with reg 14(1) of the AFSJR. We reproduce below reg 14(1) of the AFSJR —*

- (b) *if the Commanding Officer does not dismiss the charge pursuant to s 96(4) of the AFA and reg 14(1) of the AFSJR — (i) the Commanding Officer has a discretion to deal summarily with the charge if the charge is one which can be dealt with summarily by the Commanding Officer — please refer to ss 96(2), 97(2)(a), (b) and (3) of the AFA read with reg 12 of the AFSJR. Regulation 12 of the AFSJR states as follows — ...;*

I

- A

or

(ii) the Commanding Officer shall take steps prescribed by AFA for the accused to be court-martialed in the following circumstances
- B

(iia) the charge is one which cannot be dealt with summarily by the Commanding Officer — please refer to s 97(2)(a) of the AFA; or

(iib) the charge is one which can be dealt with summarily by the Commanding Officer but the Commanding Officer is of the opinion that the charge should not be dealt with summarily — please refer to s 97(2)(b) of the AFA ('s 97(2)(b) option');
- C

(3) *if a Commanding Officer exercises s 97(2)(b) option, ie, if a Commanding Officer takes steps for the court-martial of the accused, by reason of s 97(11) of the AFA, a higher authority than the Commanding Officer may refer the charge back to the Commanding Officer for the charge to be dealt with summarily by the Commanding Officer. Such a reference back to the Commanding Officer is not available when an accused has elected to be tried by court-martial under s 97(9) of the AFA — please refer to the proviso to s 97(11) AFA and sub-para (5) below;*
- D

(4) according to s 96(5) of the AFA, a Commanding Officer deals summarily with the charge by —
- E

(a) dismissing the charge; or

(b) finding that the accused is guilty of the charge by recording such a finding of guilty and by awarding punishment of the accused as provided in s 97(3)(a) to (g) of the AFA (subject to the specific provisions in s 97(4), (5), (6), (7) and (8) of the AFA) In this regard, reg. 13 AFSJR has provided that a Commanding officer may award any of the punishments prescribed under, among others, s 97 of the AFA; and
- F

(5) when a Commanding Officer deals summarily with the charge and has determined that the accused is guilty and —
- G

(a) if Commanding Officer will award the following punishment which is not a —
- H

(i) a severe reprimand;

(ii) a reprimand; (Hi) a fine; or

(iii) a minor punishment, or
- I

(b) where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine)

the Commanding Officer shall not record a finding of guilty until the Commanding Officer has given the accused a right to elect to be tried by court-martial.

If the accused elects to be court-martialled and does not subsequently withdraw his or her election in accordance with regulations made under Part V of the AFA, the Commanding Officer shall not record a finding of guilty but shall take steps prescribed by AFA for the court-martial of the accused. (Emphasis added.)

[27] The learned JC relied on:

- (1) the Supreme Court's judgment in *Savrimuthu*; and
- (2) two High Court cases in *Baharuddin* and *Sjn (U) Ahmad Zaini Zainon* to decide as follows:
 - (a) the plaintiff could only be lawfully remanded under s 96(3) of the AFA and r 16(1) of the AFRP when witnesses had been called to testify in the trial (court-martial); and
 - (b) the plaintiff's remand under s 96(3) of the AFA was only valid if there was an express remand order made by the first or second defendant.

We now reproduce below the relevant parts of the judgment in *Baharuddin* and *Sjn (U) Ahmad Zaini Zainon*:

- (i) it was decided in *Baharuddin*, at pp 191 to 192, as follows:

*Having heard the submission of both counsel for the applicant and Federal Counsel for the first respondent and having perused the affidavits filed by both parties, I am of the view that the question of whether the applicant had been lawfully detained or not is focused on the correct interpretation and the application of the provision of r 16(1) (AFRP) to the facts and circumstances of this case. As I see it the said r 16(1) (AFRP) comes into operation at the stage when the trial of the applicant as an accused person before the court-martial had commenced and only then can the applicant as in this case be detained under close arrest. It is my view that the phrase 'during (his trial by a court-martial)' means that the trial of the applicant as in this case must have commenced before the court-martial. As regards the meaning of commencement of trial, in the case of *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173, Tun Salleh Abbas LP in delivering the judgment of the Supreme Court at p 177 stated as follows:*

Thus in the context the commencement of trial must mean the commencement of the examination, cross-examination and reexamination of one or more witnesses.

In the present case, I find that the trial before the court-martial did not commence on 8 September 1995 but it commenced on 3 October 1995 when one witness was called to give evidence. Since the trial did not commence on 8 September 1995, it is my finding that the first respondent had no power to invoke r 16(1) (AFRP) to detain the applicant under close arrest on 8 September 1995 and such detention was unlawful in the circumstances of the case.

As regards the contention of learned Federal Counsel that on 8 September 1995 the applicant was in fact lawfully detained by virtue of the power vested in the commanding officer under s 96(3) (AFA), I could not agree with her. The provision of s 96(3) (AFA) in my view is only applicable at the stage when the applicant as an accused person had not been brought as yet for trial before the court-martial. s 96(3) empowers the commanding officer to detain the applicant as an accused person at a stage when he has completed his investigation on the

A *applicant and decides not to try the applicant summarily by himself but decides*
that the applicant be tried before the court-martial In the present case, the
applicant had already appeared before the court-martial and the charges had been
preferred against him. There is no question of the commanding officer exercising
his power to detain the applicant under close arrest at this stage of the proceeding
B before the court-martial on this point, I also find as a matter of fact that this
allegation of the commanding officer invoking his power under s 96(3) was not
averred to at all in the affidavit of the first respondent In the absence of such an
avermment, it must be taken to mean that there was no exercise of such power under
C s 96(3) (AFA) by the commanding officer to detain the applicant until the hearing
of the applicant's case before the court-martial. (Emphasis added.)

(ii) the above judgment in *Baharuddin* had been adopted in *Sjn (U) Ahmad Zaini Zainon*, at [30], [34] and [36], as follows:

D [30] Seksyen 96(3) (AFA) adalah mengenai keadaan sebelum sedituduh
dikemukakan untuk perbicaraan ke hadapan Mahkamah Tentera dengan
menyatakan:

...

E [34] Seksyen 96(3) (AFA) adalah juga berbeza dengan kaedah 16(1) (AFPR)
kerana (s 96(3) AFA) adalah berkata tentang reman setelah penyiasatan,
manakala kaedah 16(1) (AFPR) adalah pada peringkat di mana perbicaraan
Mahkamah Tentera telah dijalankan secara separuh bicara di dalam nas
Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan
TLDM Lumut [1996] 4 MLJ 184; [1995] CLJ 310 dinyatakan:

...

F [36] Berdasarkan alasan-alasan tersebut, mahkamah tidak bersetuju dengan
hujahan bahawa terdapat pelanggaran terhadap perkara 5(1) dan 5(4)
Perlembagaan Persekutuan kerana kaedah 16(1) [AFPR membolehkan
tangapan rapi dilakukan setelah persidangan Mahkamah Tentera berlangsung
dan akan di sambung bicara dan ini boleh dilakukan tanpa keperluan untuk
G merujuk tahanan kepada seorang majistret. (Emphasis added.)

[28] We are of the following view regarding the validity of a detention
(pending court-martial):

H (1) for a serviceman or an 'officer' (defined in s 2 of the AFA)
(‘serviceman/officer’), upon the fulfilment of the following two
conditions in s 96(3) of the AFA (‘two conditions (s 96(3) of the AFA)’):

- I (a) the investigation by the Commanding Officer with regard to the
charge against the serviceman/officer, had been completed; and
(b) the serviceman/officer had elected to be tried in a court-martial
under s 97(9) AFA
– the following two consequences ‘shall’ follow pursuant to s 96(3)
of the AFA (‘two consequences (s 96(3) of the AFA)’), namely:

- (i) the charge against the serviceman/officer cannot be disposed of summarily under ss 96(1), (2), (5) and 97(3) of the AFA read with reg 12 AFSJR; and A
 - (ii) the serviceman/officer 'shall be remanded for trial by court-martial'. Accordingly to r 16(1) of the AFRP, the 'remand' of an accused pending trial (court-martial) refers to the close arrest of the accused. B
- (2) once the two conditions (s 96(3) of the AFA) are satisfied, the two consequences (s 96(3) of the AFA) are intended by Parliament to be mandatory in effect. This is because the Legislature has employed an imperative term 'shall' in s 96(3) of the AFA. Additionally, r 16(1) of the AFRP (made by the Minister of Defence pursuant to s 119 of the AFA) also uses the term 'shall' by providing that an accused 'shall be held under close arrest' during the trial (court-martial); C
- (3) the only exception to a detention (pending court-martial) is provided in r 16(1) of the AFRP. According to r 16(1) of the AFRP, an accused 'shall be held under close arrest except where the convening authority (not the commanding officer and court-martial) directs that the accused: D
 - (a) 'shall be held under open arrest'; or E
 - (b) is released from arrest.
- (4) s 96(3) AFA does not state that s 96(3) of the AFA is subject to rr 14(1), (2), 15(1) to (3), 16(2), 38(1) of the AFRP and/or any other rule in AFRP. Furthermore, the fact that r 16(1) of the AFRP has expressly provided for an exception to s 96(3) of the AFA, means that all the rules in AFRP (other than r 16(1) of the AFRP) cannot have any effect on the two consequences (s 96(3) of the AFA). F
In this regard:
 - (a) r 14(1) of the AFRP only empowers the commanding officer to re-consider the arrest (investigation) and/or detention (pending investigation) of a serviceman/officer without prejudice to the Commanding Officer's power to re-arrest the serviceman/officer. Rule 14(1) of the AFRP does not concern the mandatory power under s 96(3) of the AFA and r 16(1) of the AFRP to remand an accused pending the trial (court-martial); G
 - (b) r 14(2) of the AFRP merely provides that: H
 - (i) the investigation 'shall be duly investigated into without unnecessary delay and as soon as possible' so as to ensure that a serviceman/officer is charged under s 96(1) or (2) of the AFA (whichever is applicable); and I
 - (ii) if there was an unnecessary delay in the investigation, the

- A** serviceman/officer ‘shall be duly released’ from the detention (pending investigation) (not released from the detention (pending court-martial) as the serviceman/officer had not been charged with any offence under the AFA).
- B** As explained in the above sub-para 24(3), there was no undue delay in the first defendant’s investigation of the charge (s 51 of the AFA) against the plaintiff in this case.
- C** (c) r 15(1) and (2) of the AFRP provide for a report regarding a delay in the investigation as understood in s 94(2) of the AFA (not a delay in the trial (court-martial)). In this case, the first defendant’s report (s 94(2) of the AFA) had been prepared (which explained the delay in the first defendant’s investigation regarding the charge (s 51 of the AFA) against the plaintiff);
- D** (d) r 15(3) of the AFRP only applies if a serviceman/officer has been arrested for more than 72 days without a charge and in such a case, the serviceman/officer shall be released from the detention (pending investigation) (not released from the detention (pending court-martial)) unless the convening authority, with the prior approval of the competent authority, directs in writing that the serviceman/officer shall not be released from arrest. In this case, the plaintiff had not been arrested for more than 72 days without a charge. As such, there was no room to invoke r 15(3) of the AFRP in this case;
- E**
- F** (e) r 16(2) of the AFRP only applies after the court-martial has found an accused guilty of the charge and if the sentence meted out by the court-martial is lower than detention, the accused ‘shall be released from arrest immediately’; and
- G** (f) r 38(1) and (2) of the AFRP do not provide for any power for the Commanding Officer to release an accused from detention (pending court-martial) by way of close arrest;
- H** (5) s 23(1) of the IA is pertinent. AFA has been revised under the Revision of Laws Act 1968. Consequently, according to s 2(1)(b) of the IA, Part I of the IA applies in the construction of the AFA.
Section 23(1) of the IA is in Part I of the IA and provides as follows:
Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency. (Emphasis added.)
- I** By virtue of s 23(1) of the IA, if any of the rules in AFRP, including rr 14(1), (2), 15(1), (2), (3), 16(2), 38(1) and/or any other rule in the AFRP (except r 16(1) of the AFRP), is inconsistent with s 96(3) of the AFA, the AFRP shall be void to the extent of the inconsistency with s 96(3) of the AFA;

- (6) s 96(3) of the AFA and r 16(1) of the AFRP do not provide that an accused can only be lawfully remanded under s 96(3) of the AFA and r 16(1) of the AFRP if the trial (court-martial) has commenced in the sense that at least one witness has been called to give evidence in the trial (court-martial).
The Supreme Court's decision in *Savrimuthu* did not concern s 96(3) of the AFA and r 16(1) of the AFRP; A B
- (7) there is nothing in s 96(3) of the AFA and r 16(1) of the AFRP which require an express remand order by the Commanding Officer, court-martial or convening authority before an accused can be lawfully remanded under s 96(3) of the AFA and r 16(1) of the AFRP. As explained in the above sub-paras (1) and (2), the two consequences (s 96(3) of the AFA) mandatorily ensue as a matter of operation of law upon the fulfilment of the two conditions (s 96(3) of the AFA).
The above interpretation of s 96(3) of the AFA and r 16(1) of the AFRP is supported by a comparison between s 96(3) of the AFA and r 16(1) of the AFRP on the one part and s 117 of the Criminal Procedure Code ('the CPC') (which provides for the discretionary power of a Magistrate to remand a suspect pending the completion of police investigation) on the other part. Section 117 of the CPC states as follows: C D E
- s 117 Procedure where investigation cannot be completed within twenty-four hours
- (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate. F
- (1A) The Public Prosecutor may appear in any application made under this section. G
- (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows: H
- (a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application; or
- (b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application. I
- (3) The officer making the investigation shall state in the copy of the entries

- A** in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.
- B** (4) The Magistrate, in deciding the period of detention of the accused person, shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application.
- (5) The Magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice.
- C** (6) If the Magistrate has, no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to transmission for trial by the High Court.
- D** (7) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing. (Emphasis added.)
- E** Section 117(2) and (7) of the CPC have expressly required an ‘authorisation’ by a magistrate (with reasons) for a remand of a suspect in police custody. Section 96(3) of the AFA and r 16(1) of the AFRP have no wording which is similar to s 117(2) and (7) of the CPC (which requires a Commanding Officer, court-martial or convening authority to give an order (with reasons) to remand a serviceman pursuant to s 96(3) of the AFA and r 16(1) of the AFRP);
- F** (8) the above construction of s 96(3) of the AFA and r 16(1) of the AFRP is supported by the following reasons:
- G** (a) s 96(3) of the AFA and r 16(1) of the AFRP are specific provisions of written law. By virtue of the maxim of statutory interpretation, *generalia specialibus non derogant*, s 96(3) of the AFA and r 16(1) of the AFRP shall prevail over all other statutory provisions in AFA, AFRP and other written law which are contrary to s 96(3) of the AFA and r 16(1) of the AFRP (if any);
- H** (b) there no mandatory military service in Malaysia. All servicemen/officers voluntarily enlist in our ‘Armed Forces’ (within the definition in s 2 of the AFA) There is therefore no cause or reason for any serviceman/officer to complain about the mandatory effect of s 96(3) of the AFA and r 16(1) of the AFRP; and
- I** (c) when a serviceman/officer is placed under close arrest during the detention (pending court-martial), the serviceman/officer is paid his or her salary and allowances without doing any work;
- (9) in view of the reasons for our interpretation of s 96(3) of the AFA and

r 16(1) of the AFRP as stated in the above sub-paras (1) to (8), we are constrained to overrule the High Court decisions in *Baharuddin* and *Sjn (U) Ahmad Zaini Zainon*.

A

[29] As explained in the above para 28:

B

(1) the learned JC committed the following three errors of law ('High Court's three legal errors') in this case:

(a) the plaintiff could only be lawfully remanded under s 96(3) AFA if the first or second defendant had made a remand order;

C

(b) the detention (pending court-martial) was not valid because no witness had testified at the trial (court-martial); and

(c) the High Court erroneously relied on r 14(2) of the AFRP (which only applies to the detention (pending investigation) and not to the detention (pending court-martial).

D

(2) the detention (pending court-martial) is valid pursuant to s 96(3) of the AFA and r 16(1) of the AFRP.

[30] Section 54 of the IA provides as follows:

E

s 54 *Computation of time*

(1) *In computing time for the purposes of any written law —*

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

F

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;

G

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

H

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

(2) *Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.* (Emphasis added.)

I

Section 54(1) and (2) of the IA only apply to compute the time period for

A anything to be done under any written law. Section 96(3) of the AFA and r 16(1) of the AFRP do not provide for any time period to complete the trial (court-martial). Hence, the learned JC had committed an error of law by applying s 54(2) of the IA in this case ('High Court's fourth legal error').

B I. WAS THERE A BREACH OF ART 5(1) OF THE FC IN THIS CASE?

[31] Article 5(1) of the FC provides as follows:

C Article 5(1) *No person shall be deprived of his life or personal liberty save in accordance with law.* (Emphasis added.)

The term 'law' is defined in art 160(2) of the FC to include 'written law'. 'Written law' is defined in s 3 of the IA as follows:

D 'written law' means —

- (a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;
- (b) *Acts of Parliament and subsidiary legislation made thereunder;*
- E (c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and
- (d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof; (Emphasis added.)

G [32] As explained in the above para 28, the detention (pending court-martial) was valid according to s 96(3) of the AFA and r 16(1) of the AFRP. Section 96(3) of the AFA and r 16(1) of the AFRP constitute 'written law' within the meaning of s 3(b) of the IA and 'law' in art 5(1) of the FC. Accordingly:

- H (1) the plaintiff's personal liberty had been lawfully deprived in accordance with 'law' as provided in art 5(1) of the FC, namely, pursuant to s 96(3) of the AFA and r 16(1) of the AFRP; and
- (2) the High Court's judgment cannot stand and the global sum (damages) must be set aside.

I J. OUTCOME OF TWO APPEALS

[33] Premised on the above evidence and reasons, in particular the High Court's first to fourth legal errors:

- (1) the defendants' appeal is allowed; A
- (2) the plaintiff's appeal is dismissed;
- (3) the High Court's judgment is set aside; and
- (4) one set of costs of RM40,000 shall be paid by the plaintiff to the B
defendants for:
 - (a) the two appeals; and
 - (b) the proceedings in the High Court.

*Defendants' appeal allowed; plaintiff's appeal dismissed; High Court's judgment set C
aside with one set of costs in the sum of RM40,000 to be paid by plaintiff to
defendants for the two appeals and High Court's proceedings.*

Reported by Dzulqarnain Ab Fatar D

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